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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Daniel Long,

10 Plaintiff,

11 v.

12 Corizon Health Services,

13 Defendant.

14
15 No. CV 20-00098-PHX-SPL (JZB)

16
17 **ORDER**

18 Plaintiff Daniel Long, who was formerly in the custody of the Arizona Department
19 of Corrections (ADC), brought this civil rights action pursuant to 42 U.S.C. § 1983. (Doc.
20 1.) Defendant moves for summary judgment, and Plaintiff opposes.¹ (Docs. 26, 29.)

21 **I. Background**

22 On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated
23 an Eighth Amendment medical care claim against Defendant based on allegedly
24 deliberately indifferent treatment of Plaintiff's serious medical needs between March 16,
25 2019 and April 28, 2019. (Doc. 6; Doc. 29.) Defendant now moves for summary judgment
26 as to that claim on the ground that there is no evidence that Defendant violated Plaintiff's
27 Eighth Amendment rights in its provision of medical care.

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¹ The Court provided notice to Plaintiff pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc) regarding the requirements of a response. (Doc. 28.)

1 **II. Summary Judgment Standard**

2 A court must grant summary judgment “if the movant shows that there is no genuine
 3 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 4 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The
 5 movant bears the initial responsibility of presenting the basis for its motion and identifying
 6 those portions of the record, together with affidavits, if any, that it believes demonstrate
 7 the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

8 If the movant fails to carry its initial burden of production, the nonmovant need not
 9 produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099,
 10 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts
 11 to the nonmovant to demonstrate the existence of a factual dispute and that the fact in
 12 contention is material, i.e., a fact that might affect the outcome of the suit under the
 13 governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable
 14 jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
 15 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th
 16 Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its
 17 favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however,
 18 it must “come forward with specific facts showing that there is a genuine issue for trial.”
 19 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal
 20 citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

21 At summary judgment, the judge’s function is not to weigh the evidence and
 22 determine the truth but to determine whether there is a genuine issue for trial. *Anderson*,
 23 477 U.S. at 249. In its analysis, the court must believe the nonmovant’s evidence and draw
 24 all inferences in the nonmovant’s favor. *Id.* at 255. The court need consider only the cited
 25 materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

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1 **III. Facts²**

2 At all times relevant to this action, Plaintiff was in the custody of the ADC and
 3 Defendant Corizon was the contracted medical care provider for prisoners in the custody
 4 of the ADC until June 30, 2019. (Doc. 27 ¶¶ 1-2.)

5 On March 16, 2019, Plaintiff submitted a health needs request (HNR) requesting a
 6 refill for his Ibuprofen prescription, alleging migraines and back pain from “doing
 7 nothing.” (*Id.* ¶ 3.) On March 18, 2019, LPN Tomlinson responded, informing Plaintiff
 8 the prescription was discontinued and he needed to submit another HNR requesting to be
 9 seen on the nursing line first in order to renew it. (*Id.*)

10 On March 25, 2019, Nurse McNutt responded to a medical Incident Command
 11 System (ICS) alert for Plaintiff. (*Id.* ¶ 4.) Plaintiff reported he was working out and doing
 12 pushups when his back went out and that he had pain, which improved with lying down
 13 and worsened with mobility. (*Id.*) Upon exam, Plaintiff was able to stand, and his straight
 14 leg raise was equal and strong, Plaintiff did not complain of past or present urinary
 15 incontinence, fever, vomiting, or tingling. (*Id.*) Plaintiff was prescribed Analgesic Balm
 16 ointment twice daily (bid) and Ibuprofen (NSAID-Motrin—pain) 600 mg bid prn (as
 17 needed), and was given a special needs order (SNO) for medical ice. (*Id.*) He was also
 18 told to submit HNRs as needed if new or worsening symptoms occurred. (*Id.*)

19 On March 27, 2019, Plaintiff submitted another HNR, stating he was experiencing
 20 back pain and needed to be seen; in response, he was scheduled for the nurse line. (*Id.* ¶ 5.)
 21 On March 28, 2019, Plaintiff submitted another HNR stating he was still in back pain, was

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23 ² Plaintiff did not file a controverting statement of facts as required by the Court’s
 24 Local Rules of Civil Procedure and discussed in the Court’s *Rand* Order. Because Plaintiff
 25 did not file a controverting statement of facts, the Court will consider Defendant’s
 26 supported facts undisputed unless they are clearly controverted by Plaintiff’s non-
 27 conclusory first-hand allegations in the verified Complaint or other evidence in the record.
 28 See *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004) (holding that where the nonmovant
 29 is a pro se litigant, the Court must consider as evidence in opposition to summary judgment
 30 all the nonmovant’s contentions set forth in a verified complaint or motion).

1 requesting blood work, and needed to be seen and was informed he was scheduled for the
2 nurse line. (*Id.* ¶ 6.) On March 29, 2019, RN Hunter saw Plaintiff for a Nurse Scheduled
3 Sick Call in response to a HNR request; Plaintiff complained of back pain, stated that he
4 fell in the shower two days prior, and reported improvement with heat. (*Id.* ¶ 7.) The
5 assessment was altered mobility and, on top of his previous medications, Plaintiff was
6 given a Ketorolac Trometh injection, (Toradol-pain) 60 mg now, SNO for bed rest for 3
7 days (expires 4/12), and nursing explained the Toradol injection was a muscle relaxant and
8 that additional Keep on Person (KOP) medications would follow as well. (*Id.* ¶ 7.)

9 On April 2, 2019, RN McNutt saw Plaintiff for a Nurse Scheduled Sick Call in
10 response to an HNR submitted on March 30; Plaintiff reported that he was dealing with a
11 back injury, felt weak, and that he pulled something in his back. (*Id.* ¶ 8.) Plaintiff
12 complained of back pain ranging from 1-5/10. Plaintiff still had active prescriptions for
13 Ibuprofen and Analgesic Balm, and he was referred to the provider line. (*Id.*)

14 On April 4, 2019, Plaintiff submitted another HNR complaining of back and foot
15 pain and requested a wheelchair; in response, he was scheduled on the nurses line. (*Id.*
16 ¶ 9.) That same day, NP Ndemanu saw Plaintiff during an unscheduled provider sick call
17 and Plaintiff reported right ankle pain. (*Id.*) NP Ndemanu ordered x-rays, 3V for the ankle.
18 (*Id.*) Plaintiff was scheduled for a follow-up appointment for 4/9 at 7:30 a.m. to get the
19 x-ray results. (*Id.*) Plaintiff was given SNOs for an ACE wrap and medical ice for 4/4/2019
20 to 4/12/2020. (*Id.*)

21 On April 6, 2019, RN Rowe saw Plaintiff in response to an HNR. (*Id.* ¶ 11.)
22 Plaintiff complained of continued back pain and complained of “something feeling
23 pinched” in his back and requested a wheelchair. (*Id.*) Upon examination, his right lower
24 leg and foot had swelling and redness and Plaintiff’s vitals were within normal limits. (*Id.*)
25 A SNO for a wheelchair for 3 days (expires 4/12) was issued and he was scheduled for the
26 provider line. (*Id.* ¶ 11.)

27 On April 7, 2019, Plaintiff submitted another HNR requesting his Ibuprofen keep
28 on person medication be refilled; the medication was refilled. (*Id.* ¶ 12.) On April 9, 2019,

1 NP Ndemamu saw Plaintiff for a Nurse Treatment Call in response to a HNR; Plaintiff
2 complained of right foot and heel swelling and back pain and Plaintiff denied fever, chills,
3 loss of sensation or strength. (*Id.* ¶ 13.) Plaintiff reported that rest and medication helped
4 with pain. (*Id.*) The plan was: Prednisone (steroid) 50 mg every morning for 5 days; labs
5 ordered: urinalysis (which was found to be negative), an x-ray, CPK (stress to muscle
6 tissue), diagnostic panel 2, continue Clindamycin and Ibuprofen. (*Id.*) Plaintiff's labs were
7 within normal limits except creatinine, which was low, but within acceptable parameters
8 (*Id.*) A follow-up was scheduled in 14 days. (*Id.*)

9 On April 9, 2019, Dr. Paul reviewed the ankle x-ray results. (*Id.*) The x-ray findings
10 were: no acute fracture or dislocation, ankle joint space and mortise are maintained, there
11 is generalized leg and ankle soft tissue swelling, no radio dense foreign body, calcaneus
12 and talus are intact, base of fifth metatarsal is intact as visualized. (*Id.*) Plaintiff was
13 notified of the results the next day. (*Id.*)

14 Also on April 9, 2019, Dr. Plosker reviewed the lumbar x-ray results and the
15 findings were: "Lumbar vertebral body heights appear maintained. No acute fractures are
16 seen. Intervertebral disc heights appear maintained. AP projection demonstrates intact
17 bony pedicles and sacroiliac joints. Spot LS-S1 view without an upper displaced sacral
18 fracture. There are a few tiny anterior osteophytes. Bilateral oblique view without an
19 obvious pars defect." (*Id.* ¶ 15.) Plaintiff was notified the next day. (*Id.*)

20 On April 16, 2019, Plaintiff submitted another HNR, requesting his Ibuprofen keep
21 on person medication be refilled and the medication refill was requested. (*Id.* ¶ 16.) On
22 April 18, 2019, Plaintiff submitted an HNR alleging ADC staff took his wheelchair so that
23 it could be given to someone else and did not give him another assistive device; in response,
24 he was scheduled for the nurses line. (*Id.* ¶ 17.)

25 On April 26, 2019, NP Rowe saw Plaintiff for an ICS response; Plaintiff stated he
26 was walking and his back locked up and then he passed out; Plaintiff complained of back
27 pain and that movement made it worse. (*Id.* ¶ 18.) NP Johnson was notified and he ordered
28 Toradol injection, 1x; Renew Ibuprofen, but do not give for 12 hours; NP Johnson stated

1 that Plaintiff should be sent out ICS 911 to rule out sepsis. (*Id.*) It was noted NS 9% IV
 2 (fluids) wide open, blood pressure checks every 15 minutes. (*Id.*) Plaintiff was sent to
 3 Abrazo West Emergency Room for evaluation. (*Id.*)

4 On April 27, 2019, RN Dodd saw Plaintiff upon his return from Abrazo ER. (*Id.*
 5 ¶ 19.) Plaintiff reported that Abrazo providers informed him he had a kidney infection and
 6 gave him antibiotics; Plaintiff reported back pain upon return, but was improving compared
 7 to previous reports. (*Id.*) Plaintiff was prescribed additional medications of Cephalexin
 8 (Keflex- antibiotic) 500 mg four times daily (qid) and was deemed stable and returned to
 9 unit. (*Id.*) That same day, NP Johnson reviewed Plaintiff's hospital records and noted
 10 Plaintiff was treated at Abrazo for pyelonephritis/kidney infection and that Keflex was
 11 recommended for 10 days. (*Id.*) A follow-up appointment was scheduled for April 29,
 12 2019 as recommended. (*Id.*)

13 At 2:33 p.m. that same day, Dr. Sherrill from Abrazo called the HUB at the prison
 14 site and reported that lab results showed that Plaintiff had grown bacteria on cultures and
 15 needed to return to the hospital for admission for IV antibiotics and further workup. (*Id.*
 16 ¶ 21.) Dr. Sherrill stated Plaintiff would likely get a PICC line and further lab testing; the
 17 labs showed Gram negative cocci in pairs and there was more than one culture. (*Id.*)
 18 Plaintiff was informed and the plan was to send him to Banner Estrella for admission. (*Id.*)

19 On May 1, 2019, RN Hunter responded to Plaintiff's HNR submitted on April 20
 20 where he complained of his wheelchair being taken, but the appointment was cancelled as
 21 Plaintiff was already in the hospital at that point. (*Id.* ¶ 22.)

22 On May 5, 2019, RN Zeigler saw Plaintiff upon his return from hospitalization and
 23 he was admitted to the infirmary. (*Id.* ¶ 23.) Plaintiff had a PICC line to left upper arm
 24 and was able to ambulate into the unit without assistive devices. (*Id.*) Plaintiff's grip
 25 strength and foot push strength was equal and strong and he asserted the back pain was off
 26 and on, but that he had pain with movement, but was "doing as much as he could." (*Id.*)
 27 Plaintiff was prescribed: "Codeine/APAP (Tylenol #3) 30-300 mg qid prn, Nafcillin
 28 (antibiotic) injection 3 gram qid, Rifampin (TB) 300 mg bid, antibiotics for M[R]SA and

1 bacteremia for 6 weeks.” (*Id.*)

2 That same day, NP Fletcher noted in her Medical Provider Infirmary Admission as
3 follows: “This 35 year old male inmate admission to inpatient after discharged from Banner
4 Thunderbird with diagnosis of epidural abscess within surgical incision for draining,
5 MRSA as cause of Bacteremia. Patient also has right upper arm swelling with diagnosis
6 of thrombophlebitis (blood clot blocking one or more veins), reports feeling well but not
7 fully recovered.” (*Id.* ¶ 24.) Plaintiff’s treatment plan included: dressing changes daily,
8 and PICC line change weekly for 6 weeks and to start Diazepam (muscle relaxant) bid,
9 Docusate Sodium (Colace-stool softener) 100 mg bid, and a diagnostic panel 2 was
10 ordered. (*Id.*) Plaintiff was to follow-up with neurosurgery and Infectious Disease
11 Specialty in two weeks. (*Id.*) That same day, NP Fletcher submitted off-site consultation
12 requests for radiology (venous ultrasound of right arm to rule out DVT), neurosurgery and
13 infectious disease specialty follow-ups; an alternative treatment plan for the venous
14 ultrasound was accepted thereafter on May 13, 2019, and Plaintiff was scheduled for a
15 neuro surgery consult for May 14, 2019 and was scheduled for an infectious disease
16 consult. (*Id.* ¶ 25.)

17 That same day, RN Slagle saw Plaintiff during nursing infirmary rounds, no signs
18 or symptoms of infection were reported and Plaintiff’s medications were Diazepam 5g x2
19 daily (expires 5/7/19), Tylenol with Codeine # 3 300 mg x4 daily prn (expires 5/9/19),
20 Nafcillin Sodium 1 gm injection x4 daily (expires 6/13/19), and Rifampin 300 mg x2 daily
21 (expires 5/18/19). (*Id.* ¶ 26.)

22 In May 2019, Plaintiff underwent L3-4 bilateral decompressions with facetectomy
23 for evacuation of epidural abscess; a month after the surgery, Plaintiff continued to
24 experience back pain. (*Id.* ¶ 114.) Dr. Long noted: “Patient has done well after surgery
25 but as expected, continues to suffer from back pain. Patient Will require lumbar
26 stabilization once his antibiotics are completed. I look forward to seeing him back in the
27 office in 1 month with a repeat lumbar MRI with and without contrast.” (*Id.*) In October
28 2019, Plaintiff underwent surgery for instability, L3/L4 Transforaminal and posterolateral

1 fusion with instrumentation. (*Id.* ¶ 122.)

2 **IV. Discussion**

3 Defendant asserts that it is entitled to summary judgment because Plaintiff failed to
4 provide any evidence to prove that any Corizon policy was the moving force behind any
5 alleged violation of his constitutional rights. Defendant asserts that it is also entitled to
6 summary judgment because the records demonstrate decisions that Corizon staff made
7 were based on the subjective and objective medical information they had available to them
8 at the time and that they responded to Plaintiff's medical needs, and Plaintiff's allegations
9 that Corizon staff should have done more sooner, including different testing and x-rays,
10 does not represent cruel and unusual punishment or deliberate indifference, and Plaintiff's
11 disagreement with his treatment or even negligence in his treatment are insufficient to
12 support an Eighth Amendment claim.

13 In Response, Plaintiff asserts that his providers should have been alerted to the fact
14 that something was more seriously wrong with him due to his HNRs. Plaintiff asserts that
15 providers should have realized their treatment was not working and that his problems were
16 beyond the scope of their knowledge and treatment and should have realized that Plaintiff
17 needed to be referred to providers with more knowledge and a facility with superior
18 equipment. Plaintiff asserts that he was in pain for 42 days (between March 16 to April
19 22) without a proper diagnosis and the prison did not have an MRI machine so that they
20 could have detected the MRSA infection that was found at the hospital. Plaintiff asserts
21 that he believes that Corizon employees were trying everything to delay sending him to an
22 outside provider for medical services because it costs more to do this and Corizon was
23 attempting to save money by not referring Plaintiff to an outside provider.

24 **A. Legal Standard**

25 To support a medical care claim under the Eighth Amendment, a prisoner must
26 demonstrate "deliberate indifference to serious medical needs." *Jett v. Penner*, 439 F.3d
27 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). There are
28 two prongs to the deliberate-indifference analysis: an objective standard and a subjective

1 standard. First, a prisoner must show a “serious medical need.” *Jett*, 439 F.3d at 1096
 2 (citations omitted). A “‘serious’ medical need exists if the failure to treat a prisoner’s
 3 condition could result in further significant injury or the ‘unnecessary and wanton infliction
 4 of pain.’” *McGuckin v. Smith*, 974 F.2d 1050, 1059–60 (9th Cir. 1992), *overruled on other*
 5 *grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc)
 6 (internal citation omitted).

7 Second, a prisoner must show that the defendant’s response to that need was
 8 deliberately indifferent. *Jett*, 439 F.3d at 1096. “Prison officials are deliberately
 9 indifferent to a prisoner’s serious medical needs when they deny, delay, or intentionally
 10 interfere with medical treatment.” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002)
 11 (internal citations and quotation marks omitted); *see also Wood v. Housewright*, 900 F.2d
 12 1332, 1334 (9th Cir. 1990) (quoting *Hutchinson v. United States*, 838 F.2d 390, 394 (9th
 13 Cir. 1988)). Deliberate indifference may also be shown where prison officials fail to
 14 respond to a prisoner’s pain or possible medical need. *Jett*, 439 F.3d at 1096. “In deciding
 15 whether there has been deliberate indifference to an inmate’s serious medical needs,
 16 [courts] need not defer to the judgment of prison doctors or administrators.” *Colwell v.*
 17 *Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (quoting *Hunt v. Dental Dep’t*, 865 F.2d
 18 198, 200 (9th Cir. 1989)).

19 Deliberate indifference is a higher standard than negligence or lack of ordinary due
 20 care for the prisoner’s safety. *Farmer*, 511 U.S. at 835. “Neither negligence nor gross
 21 negligence will constitute deliberate indifference.” *Clement v. California Dep’t of Corr.*,
 22 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); *see also Broughton v. Cutter Labs.*, 622 F.2d
 23 458, 460 (9th Cir. 1980) (mere claims of “indifference,” “negligence,” or “medical
 24 malpractice” do not support a claim under § 1983). “A difference of opinion does not
 25 amount to deliberate indifference to [a plaintiff’s] serious medical needs.” *Sanchez v. Vild*,
 26 891 F.2d 240, 242 (9th Cir. 1989). A mere delay in medical care, without more, is
 27 insufficient to state a claim against prison officials for deliberate indifference. *See Shapley*
 28 *v. Nevada Bd. Of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985). The

1 indifference must be substantial. The action must rise to a level of “unnecessary and
2 wanton infliction of pain.” *Estelle*, 429 U.S. at 105.

3 Even if deliberate indifference is shown, to support an Eighth Amendment claim,
4 the prisoner must demonstrate harm caused by the indifference. *Jett*, 439 F.3d at 1096; *see*
5 *Hunt*, 865 F.2d at 200 (delay in providing medical treatment does not constitute Eighth
6 Amendment violation unless delay was harmful).

7 To support a § 1983 claim against a private entity performing a traditional public
8 function, such as providing medical care to prisoners, a plaintiff must allege facts to support
9 that his constitutional rights were violated as a result of a policy, decision, or custom
10 promulgated or endorsed by the private entity. *See Tsao v. Desert Palace, Inc.*, 698 F.3d
11 1128, 1138–39 (9th Cir. 2012) (extending the “official policy” requirement for municipal
12 liability under *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978), to private entities
13 acting under color of law). Under *Monell*, a plaintiff must show: (1) he suffered a
14 constitutional injury; (2) the entity had a policy or custom; (3) the policy or custom
15 amounted to deliberate indifference to the plaintiff’s constitutional right; and (4) the policy
16 or custom was the moving force behind the constitutional injury. *See Monell*, 436 U.S. at
17 691–94; *Mabe v. San Bernardino Cnty., Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101, 1110–
18 11 (9th Cir. 2001).

19 **B. Analysis**

20 Plaintiff does not dispute that Corizon employees were responsive to his medical
21 complaints regarding his back pain, but asserts that those employees should have realized
22 that their treatment was not working and should have referred Plaintiff to an outside
23 provider. Plaintiff produces no evidence of a standard of care that was violated or when a
24 reasonable medical provider “should” have realized that Plaintiff’s conditions were not
25 being properly diagnosed. Even if such evidence were in the record, however, negligence
26 and gross negligence cannot support a claim for cruel and unusual punishment. *Clement*,
27 220 F. Supp. 2d at 1105 (negligence, gross negligence, or even malpractice do not support
28 a claim under § 1983); *Broughton*, 622 F.2d at 460 (same).

1 Although it took 42 days from the onset of Plaintiff's back pain for his referral to
2 the hospital where Plaintiff's MRSA infection was discovered, there is no evidence in this
3 record that the treatment provided to Plaintiff by Corizon's employees constituted
4 deliberate indifference to Plaintiff's serious medical needs. There is likewise no evidence
5 in this record that any of Plaintiff's providers were motivated by saving costs or that
6 Corizon had a custom of failing to provide outside medical care in order to save costs.

7 | Accordingly, Corizon's Motion for Summary Judgment will be granted.

8 IT IS ORDERED:

9 (1) The reference to the Magistrate Judge is withdrawn as to Defendant's Motion
10 for Summary Judgment (Doc. 26).

11 (2) Defendant's Motion for Summary Judgment (Doc. 26) is **granted**, and the
12 action is **terminated** with prejudice. The Clerk of Court must enter judgment accordingly.

13 | Dated this 8th day of March, 2022.


Honorable Steven P. Logan
United States District Judge